



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**Via Facsimile & First Class Mail**  
(202) 572-8683

**AUG 10 2012**

Charles R. Spies, Esq.  
Clark Hill PLC  
1250 Eye Street, N.W.  
Suite 900  
Washington, DC 20005

RE: MUR 6618  
United Power, Inc.

Dear Mr. Spies:

On October 14, 2011, you notified the Federal Election Commission of the possibility that your client, United Power, Inc. ("UP"), may have violated certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act") in connection with activity between 2001 and 2010.

After reviewing your submission and supplemental information UP provided, the Commission found reason to believe, on July 31, 2012, that UP violated 2 U.S.C. §§ 441b and 441f, provisions of the Act, in connection with UP's reimbursement of contributions made by members of its board of directors. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determinations.

12044321968

In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

Please note that UP has a legal obligation to preserve all documents, records and materials relating to this matter until notified that the Commission has closed its entire file in this matter. See 18 U.S.C. § 1519.

We look forward to your response.

On behalf of the Commission,



Ellen L. Weintraub  
Vice Chair

Enclosures  
Factual and Legal Analysis

12044321969

12044321970

**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENT:** United Power, Inc.

**MUR: 6618**

**I. INTRODUCTION**

This matter was generated by a *sua sponte* submission filed with the Federal Election Commission ("Commission") by United Power, Inc., ("UP") an incorporated non-profit Colorado rural electric utility cooperative. See 2 U.S.C. § 437g(a)(2). The Commission has found reason to believe UP violated 2 U.S.C. §§ 441b and 441f by reimbursing contributions made by members of its Board of Directors using corporate funds.

**II. FACTUAL AND LEGAL ANALYSIS**

**A. Factual Summary**

**1. The Reimbursed Contributions**

UP distributes electricity to approximately 67,000 members in Colorado. It is a member of Colorado Rural Electric Association ("CREA") and National Rural Electric Cooperative Association ("NRECA"), which are state and national trade associations, respectively. UP filed a *sua sponte* submission ("Submission") with the Commission disclosing that it reimbursed a substantial portion of annual contributions made by members of its Board of Directors to the Action Committee for Rural Electrification ("ACRE"), the separate segregated fund of NRECA, and to the Colorado Advocates for Rural Electrification ("CARE"), the state political committee of CREA. The reimbursed contributions, made from 2001 through 2010, totaled \$37,462. Each contribution was divided between ACRE and CARE. The portion of reimbursed contributions attributable to ACRE that is still within the statute of limitations is \$7,956.

1 UP is governed by an 11-member elected Board of Directors. Submission at 3. UP  
2 directors receive no salary, but directors are reimbursed for attending meetings and for expenses.  
3 UP budgets a yearly per diem and expense account for each director from which it pays the  
4 director a per diem for attending Board, committee, and other authorized meetings, and  
5 reimburses the directors for expenses they incur in conducting UP-related business. Submission,  
6 Exs. 3.3 and 3.7. The per diem and expense account was subject to an annual cap that ranged  
7 from \$20,000 to \$25,000 during the relevant period. Submission, Ex. 3.3 at 4; *see id.* at Ex. 6.5.

8 CARE solicits annual joint "memberships" for CARE and ACRE from certain categories  
9 of individuals associated with its cooperative members at various contribution levels. *See*  
10 Submission, Ex. 4.4. The highest contribution level, \$500, is designated as the "President's  
11 Club," and those who contribute at the level automatically became "members" of both ACRE  
12 and CARE. *Id.*

13 On November 27, 2000, UP's former CEO, Robert Broderick, proposed in a  
14 memorandum to the Board an approach designed for UP to become the first cooperative to have  
15 100% participation at the "President's Club" level. Submission, Ex. 1.2. In the memorandum,  
16 Broderick said he would explain the details at the next Board meeting, but said that his idea  
17 involved using unused funds from each director's budgeted per diem/expense account to assist  
18 them in "purchasing President's Club membership." *Id.*

19 Broderick described his proposal in another memorandum to the board, dated  
20 December 19, 2000. Submission, Ex. 1.3. This memorandum says that his plan for achieving  
21 100% participation had been discussed with CREA. Broderick explained that CREA stated that  
22 each director must write a personal check for the President's Club contribution amount. Because  
23 some of the directors were apparently contributing \$100 jointly to CARE and ACRE, those

12044321971

1 directors would have to contribute another \$400 to reach the President's Club level. Submission  
2 at 4-5. Broderick advised that each director could then claim the \$400 difference as a director's  
3 expense, which would be reimbursed. Submission, Ex. 1.3. The following year, at a  
4 September 21, 2001, Board meeting, the directors approved a motion that "each Director be  
5 allowed to spend \$400 within his or her cap toward the President's Club." Ex. 2.3 at 2.

6 Thereafter, according to UP's submission, its External Affairs Director typically collected  
7 \$500 contribution checks from directors for delivery to ACRE and CARE at Board meetings  
8 each fall. Submission at 7. During these meetings, directors would typically fill out "Director's  
9 Per Diem and Expense Claim Forms" that included the \$400 CARE/ACRE contribution as an  
10 expense. *Id.* The directors themselves approved the claims by circulating and initialing the  
11 forms during Board meetings. *Id.*; Supplemental Information at 2 (Feb. 23, 2012) ("Supp.  
12 Info."). Disclosure reports filed by ACRE and CARE show that ACRE received 51% of each  
13 \$500 contribution (\$255) and CARE received 49% (\$245).

14 The per diem and expense claim forms provided by UP show that each UP director  
15 claimed reimbursement for \$400 of the \$500 CARE/ACRE contributions, for the most part  
16 listing it under a category called "other expenses."<sup>9</sup> See Exs. 5.1-5.15. The directors variously  
17 described the expense as "PAC \$400," "CARE/ACRE \$400," "CARE \$400," "ACRE \$400," or  
18 "President's Club \$400."<sup>1</sup> UP treated the contributions as expenses and reimbursed each  
19 director. See Submission at 6, Exs. 6-1 to 6-3. The reimbursements were reported as taxable

---

<sup>1</sup> In isolated instances, a few directors listed the CARE/ACRE contributions on the claim form under the "per diem" category, but UP treated them as expenses. In the submission, UP provided "Director's Per Diem and Expense Claim Form[s]" from 2004 forward. UP states that prior expense records were destroyed under its record retention policy. Submission at 6. Nonetheless, based on other available records, UP believes it also treated the contribution reimbursement as expenses in 2001 through 2003. *Id.*

12044321972

1 income in each director's IRS Form 1099 from 2004 through 2010.<sup>2</sup> Submission at 6. UP's  
2 reimbursement practice continued through 2010.

3 **2. UP's Review of the Reimbursements and Corrective Action**

4  
5 In February 2011, UP's new executive director Asche requested a review of UP's internal  
6 policies, procedures, and controls. Submission at 1; Supp. Info. at 3. Upon learning of the  
7 reimbursed contributions, Mr. Asche contacted the Board's outside counsel to determine the  
8 propriety of the reimbursements. When counsel determined that the reimbursement practice did  
9 not comply with federal law, UP immediately stopped the practice and initiated an investigation  
10 conducted by counsel. Submission at 2-3; see Supp. Info. at 3.

11 Based upon that investigation, UP concludes that the reimbursement practice resulted  
12 from a misunderstanding of what expenses could be reimbursed due to poor or misguided  
13 communication to the Board by Broderick and a former Chief Financial Officer. Submission at  
14 2, 10. According to UP, Broderick apparently believed it was permissible for UP to reimburse  
15 \$400 of the \$500 ACRE/CARE contribution from each director's budgeted per diem and  
16 expense account. Submission at 5. UP seems to suggest that this understanding may have  
17 resulted in part from documents that were prepared by ACRE. These included an ACRE  
18 "Toolkit" providing guidance on fundraising and an ACRE-produced document entitled "Legal  
19 Guidelines on Soliciting and Collecting Contributions," which state that directors could  
20 contribute to ACRE using their per diem.<sup>3</sup> *Id.* at 6, Ex. 4.2 at 1, Ex. 4.3 at 2. According to UP,  
21 two former UP directors interviewed during the internal investigation stated that the intent of the

---

<sup>2</sup> As with the expense records, UP can document the tax treatment of the reimbursements from only 2004 forward because older records were destroyed under the record retention policy.

<sup>3</sup> ACRE sent a similar ACRE "Action Kit" to Mr. Broderick on October 3, 2003, which contains the same statement about per diems. ACRE observes that its guidance documents also advise that a co-op cannot pay a member's ACRE contributions in advance, that contributions cannot be made in the name of another, and that contributions to ACRE must be made with personal checks.

12044321973

1 reimbursement practice was to allow directors to deduct from their earned per diem \$400 of the  
2 \$500 contribution to ACRE and CARE in a manner similar to UP's payroll deduction system,  
3 which is used to collect voluntary contributions from employees to ACRE and CARE. *Id.* at 6.  
4 In practice, however, UP's directors claimed virtually all of the contributions as expenses rather  
5 than as an offset to their per diems; UP, in turn, treated all of the reimbursements as expenses  
6 rather than deducting them from per diems. *Id.* at 7. Thus, the directors were paid their "earned"  
7 per diems, and the reimbursements for the contributions were paid separately as reimbursed  
8 expenses.

9 During the internal investigation, CREA's executive director at the time of the relevant  
10 events was interviewed. He was unable to provide any information concerning Broderick's  
11 December 19, 2000, memorandum to the Board, which had suggested that Broderick vetted the  
12 procedure with CREA. Supplemental Information (Apr. 16, 2012) at 3 ("Second Supp. Info").  
13 And CARE has specifically denied that anyone at CREA, CARE, or any of their agents,  
14 suggested that directors could be reimbursed for contributions to CARE and ACRE from  
15 corporate funds.

16 UP maintains that its investigation determined that there was no intent to violate federal  
17 law. Submission at 2. It emphasizes the transparency of the reimbursement process, including  
18 the fact that the directors' expense claim forms listed the purpose of the reimbursements, the  
19 apparent approval of the expense forms at Board meetings open to UP's member-customers, and  
20 the ability of UP member-customers to obtain all expense records through a written request by  
21 stating the purpose of the request. Submission at 4-5. UP also states that counsel who conducted  
22 the investigation obtained and reviewed extensive documentation and found no evidence of an  
23 intent to violate the law. Submission at 3-4, 5. Finally, UP maintains that since Broderick

12044321974

1 himself made contributions to the CARE/ACRE "President's Club" through deductions to his  
2 pay, a legally-compliant method, it is "incongruous" that he would have established an unlawful  
3 method for the directors to make contributions. *Id.* at 5.

4 Following UP's investigation, counsel advised the Board that the directors should repay  
5 UP in full for all of the reimbursed contributions. Submission at 9. UP thus sought repayment of  
6 all reimbursements from UP's living directors, including reimbursements made outside the five  
7 year statute of limitations.<sup>4</sup> *Id.* at 9-10.

8 UP has taken other corrective action as well. UP revised its policies on "Charitable and  
9 Political Contributions," "Directors' Per Diem Expenses," and "Employee Business Expense  
10 Reimbursement" to state expressly that directors, officers, and employees may not be  
11 reimbursed, directly or indirectly, for making political contributions.<sup>5</sup> *See id.*, Exs. 8.2 at 2; 8.1  
12 at 5; 8.3 at 3. In the 60 days preceding its submission, UP also conducted intensive education of  
13 its Board members and senior staff concerning federal and state campaign finance laws. *Id.* at  
14 10. Finally, UP represents that it will conduct additional education sessions for its directors and  
15 employees on campaign finance laws at least once a year, and more frequently as laws change,  
16 and it will ensure that new directors receive this education. *Id.*

<sup>4</sup> All but two of the current and living former directors who had been reimbursed sent checks to UP in the amount of all of the reimbursements they received. *Id.* at 9-10, Exs. 7.1, 7.2. One former director chose to repay only the reimbursements he received within the statute of limitations, and another elderly former director, assertedly "unable to appreciate" the facts and circumstances, declined to repay the single contribution for which he had been reimbursed in 2003. *Id.* at 9-10 & n.26. Mr. Asche paid UP for these two directors' reimbursed contributions using his personal funds. *Id.* at 9 n.26. UP has deposited these repayments, totaling \$33,462, into two segregated bank accounts, one for the reimbursed ACRE contributions and the other for reimbursed CARE contributions. *Id.* at 9-10, Ex. 7.1.

<sup>5</sup> Our review of ACRE and CARE disclosure reports showed that UP employees and UP's outside counsel also made contributions during the relevant period. At our request, UP confirmed that neither its employees nor counsel were reimbursed for their contributions. Supp. Info. at 2.

12044321975



**B. Analysis**

The Act prohibits any person from making a contribution in the name of another person and knowingly permitting his or her name to be used to effect such a contribution. 2 U.S.C. § 441f. The Act also prohibits corporations from making any contributions in connection with a federal election and prohibits corporate officers from consenting to such contributions. 2 U.S.C. § 441b(a).

It is undisputed that UP made corporate contributions in the name of another when it reimbursed \$19,105 in contributions made by its directors from 2001-2010 to ACRE, the separate segregated fund of a national trade association.<sup>6</sup> There is insufficient information, however, to demonstrate that there is a reason to believe that UP's conduct was knowing and willful. *See* 2 U.S.C. § 437g(a)(5)(B) and 437g(d). The knowing and willful standard requires knowledge that one is violating the law. *FEC v. John A. Dramesi for Cong. Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986). A knowing and willful violation may be established "by proof that the defendant acted deliberately and with knowledge that the representation was false." *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). Evidence need not show that the defendant had a specific knowledge of the applicable law; an inference of a knowing and willful act may be drawn from the defendant's scheme to disguise the source of funds used in illegal activities. *Id.* at 213-15. Based on the record evidence recounted above, there is no information available suggesting that UP attempted to conceal or disguise its reimbursements. *Cf.* MUR 5628 (AMEC Construction Management) (respondent reimbursed officers and employees for political contributions via "grossed up" bonuses to ensure the net bonus amount equaled the contribution amount). Therefore there is reason to believe that UP 2 U.S.C. §§ 441b and 441f.

<sup>6</sup> UP says that the contributions were equally divided between ACRE and CARE, putting the share attributable to ACRE at \$18,731. Submission at 4 n.4, 8. However, disclosure reports filed by ACRE and CARE show the contributions were split 51%-49%, so the portion of the contributions attributable to ACRE is \$19,105.

12044321976